TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 289

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

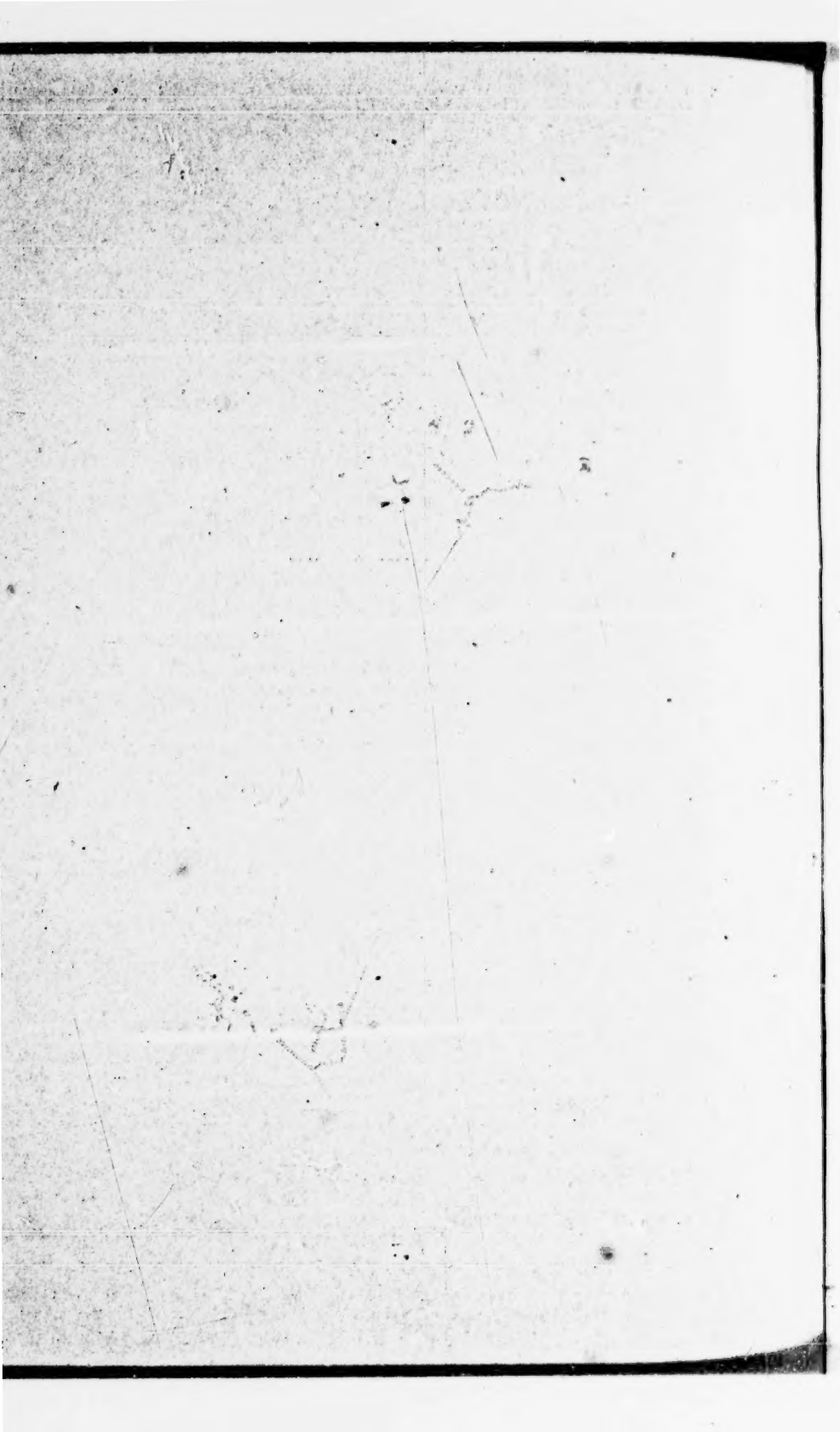
vs.

WALTER W. TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1934

CERTIORARI GRANTED OCTOBER 8, 1934



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1 *Proceedings before United States Board of Tax Appeals*

Docket entries

Docket No. 56876

WALTER W. TAYLOR, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For Petitioner: Wm. P. Jeffery, Esq. (withdrawn); Truman Henson, Esq.
For Respondent: O. W. Swecker, Esq., C. A. Ray, Esq.

1931

Apr. 20—Petition received and filed. Taxpayer notified. (Fee paid.)
" 20—Copy of petition served on general counsel.
May 14—Answer filed by general counsel.
" 25—Copy of answer served on taxpayer—assigned to General alendar.

1932

Aug. 11—Hearing set October 10, 1932.
" 25—Motion to postpone hearing to November 14, 1932, filed by taxpayer. October 29, 1932, granted.
Nov. 14—Hearing had before Mr. Trammell on merits. Submitted. Briefs due in 60 days and 10 days to reply.
" 29—Transcript of hearing of November 14, 1932, filed.

2 1933

Jan. 13—Brief filed by general counsel.
" 13—Brief filed by taxpayer. January 16, 1933, copy served on general counsel.
" 24—Reply brief filed by taxpayer.
Apr. 22—Memorandum opinion rendered, Charles M. Trammell, division 2. Judgment will be entered under rule 50.
May 13—Notice of settlement filed by general counsel.
" 17—Hearing set June 7, 1933, on settlement.
June 7—Hearing had before Mr. Morris, division 14, on settlement under rule 50—not contested—referred to Mr. Trammell for decision.
" 9—Decision entered—C. M. Trammell, division 2.
Aug. 30—Notice of the withdrawal of William P. Jeffery as counsel for taxpayer.
" 30—Notice of the appearance of Truman Henson as counsel for taxpayer.

1933
" 30—Hearing had before Mr. Adams (Trammell) on motion of petitioner for new trial—argued and motion overruled. Respondent's verbal motion to strike affidavits from petitioner's motion for new trial denied but said affidavits received only in support of motion. Motion for new trial filed.
" 30—Motion for new trial filed at hearing—denied.
Sept. 7—Transcript of hearing of August 30, 1933, filed.
3 Sept. 8—Petition for review by United States Circuit Court of Appeals (Second) with assignments of error filed by taxpayer.
" 8—Proof of service filed by taxpayer.
" 29—Agreed statement of evidence lodged.
" 29—Agreed statement of evidence approved and ordered filed.
Oct. 26—Praecipe for record filed—proof of service thereon.
Nov. 6—Order enlarging time for transmission of record to December 1, 1933, entered.

Petition.

Filed April 20, 1931

(Title omitted.)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 20, 1931,
4 and accompanying statement initialed IT:AR:A-2 UVT-60 D, and as a basis for his proceeding alleges as follows:

I. Petitioner is an individual residing at Deer Park, Greenwich, Conn., and with a place of business at 111 Broadway, New York, N.Y.

II. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to petitioner on February 20, 1931.

III. The taxes in controversy are income taxes for the calendar year 1928 and are for approximately $9,156.69.

IV. The determination of tax set forth in said notice of deficiency is based upon the following error:

The Commissioner increased the item of profit on sale of securities from $2,970 theretofore reported by petitioner to $50,228.84.

V. The facts upon which the petitioner relies as the basis of this proceeding are, upon information and belief, as follows:

1. In August, 1927, petitioner acquired all the stock of three public utility corporations, viz: Chester Water and Light Company, Reading Light & Power Co. and Brownsville Electric Co. and all of the net assets of the Chittenden-Pittsford Distribution System. The business last mentioned was thereupon incorporated by petitioner.

2. The petitioner paid for the stocks and property aforesaid and the same cost petitioner $96,030. Such sum represented the fair market value of said stock and property and the same did not have a value, market or otherwise, in excess of said sum.

3. That thereafter petitioner transferred to the Allied Public Service Corporation, a corporation organized under the laws of Delaware, all of the stock of the four utility companies mentioned above and received in exchange therefor shares of the Allied Corporation as follows:

1,000 shares no-par-value preferred stock.
2,500 shares no-par-value class A common stock.
5,000 shares no-par-value class B common stock.

The foregoing represented all of the stock of the Allied Corporation at any time outstanding. The Allied Corporation owned no property other than the utility stocks so acquired.

4. That preferred stock of the Allied Corporation was entitled to $6 cumulative preferred dividends; was preferred as to assets at $100 per share, and was callable at $105 per share. Both the A and B stocks were subordinate to the preferred stock as to dividends and as to assets. The class A stock was callable at $35 per share. The class B stock had full voting power.

5. That between August 1927, when petitioner acquired said stock and properties at a cost of $96,030, and October 1927, when petitioner transferred the same to the said Allied Public Service Corporation, there had been no change in the value of said stocks and properties and no change in business conditions affecting the value thereof, and the same were in October 1927 of a fair market value not exceeding $96,030, the cost thereof to petitioner.

6. That in the spring of 1928 there was a marked and unusual activity in connection with public utility stocks and properties. This was in large measure due to activity on the part of large utility companies to increase and round out their holdings in properties by the acquisition of small independent units. Prior to this change in conditions and the unusual and unprecedented demand for public utility properties, the Allied Corporation had attempted to effect a sale of the properties acquired by it but was unable to interest anyone in the purchase of said properties until about April 1928.

The Allied Company was negotiating with one company for the sale of these properties, and was prepared if necessary to accept the offer of such company of $125,000, when negotiations were opened with another utility company which was enlarging its chain of holdings, and in May 1928 the Allied Corporation sold all of the said properties to the second company for $205,599.94. The price finally secured for such properties was in a large measure due to the competition between the prospective purchasers. The properties sold had a special value to the purchaser—a value beyond their

intrinsic worth and normal market value. The difference between the original cost and the sale price represented an appre-
7 ciation in value which occurred in the spring of 1928.

7. Following the sale of said properties by the Allied Corporation such corporation purchased from petitioner 1,000 shares of the preferred stock theretofore issued to petitioner, and petitioner received therefor the sum of $99,000.

8. During the time such properties were held by the Allied Corporation it expended the sum of $10,669.78 in the maintenance thereof. That the Allied Corporation in its income-tax return for the year 1928 reported and paid a tax on a profit on said sale of $98,900.16, being the sale price less petitioner's cost and the maintenance expense.

9. That petitioner in his income-tax return for the year 1928 allocated his entire cost, $96,030, to the preferred stock of the Allied Corporation acquired by him and allocated no cost to the A and B stocks for the reason that the preferred stock had preference over the A and B stocks of $100,000, and the then total and market value of all of the stocks of the Allied Corporation acquired by the petitioner was only $96,030, all of which lay solely in the preferred stock. No market value was represented by the A and B stocks at the time the same were acquired. That petitioner in his income-tax return reported a profit from the sale of said preferred stock of $2,970, being the difference between original cost, $96,030, and sale price, $99,000.

10. That respondent has refused to accept such allocation
8 and profit as reported by petitioner, and for the purpose of petitioner's 1928 income tax has assigned $48,771.16 as the cost of the preferred stock acquired and sold by petitioner, thus leaving $47,258.84 as the cost of the A and B stocks and has computed the profit to petitioner on the sale of such preferred stock on such basis to wit; cost as determined by respondent, $48,771.16; sale price, $99,000; profit, $50,228.84.

11. The foregoing cost to petitioner for such preferred stock—$48,771.16—was determined by assuming the cost to petitioner of said Allied Corporation preferred stock was 99,000 (proceeds to petitioner) 194,950ths (proceeds to Allied Corporation less maintenance cost) of $96,030 (cost to petitioner).

Wherefore, your petitioner prays that this Board hear the proceeding and determine that petitioner's cost of 1,000 shares of preferred stock of Allied Public Service Corporation was $96,030 and not $48,771.16 as found by respondent and that petitioner's profit on the sale thereof was $2,970 and not $50,228.84 as found by the respondent.

Respectfully submitted.

WILLIAM P. JEFFERY,
Attorney for petitioner.

STATE OF NEW YORK,
County of New York, *ss.*:

Walter W. Taylor, being duly sworn, says that he is the
9 petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

WALTER W. TAYLOR.

Subscribed and sworn to before me this 17th day of April 1931.

DENTON MCKANE,
Notary Public.

Kings Co. No. 119, Reg. No. 3002. Cert. filed in N.Y. Co. No. 17, Reg. No. 3–Mc–8. Commission expires March 30, 1933.

Exhibit A to petition

NP–2–28

TREASURY DEPARTMENT.
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 20, 1931.

MR. WALTER W. TAYLOR,
111 Broadway, New York, New York.

SIR: You are advised that the determination of your tax
10 liability for the year(s) 1928 discloses a deficiency of $9,156.69, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P–7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

11 *Answer*

Filed May 14, 1931

[Title omitted.]

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3.

4. Denies the notice of deficiency is based upon the errors alleged and set forth in paragraph 4.

5. (1) Admits the allegations in paragraph 5(1).

5. (2) Admits that stock cost petitioner $96,030.00, but denies all other allegations in paragraph 5(2).

5. (3) Admits that petitioner transferred his stock in the four utility companies to the Allied Public Service Corporation
12 for 1,000 shares of preferred, 2,500 shares of class A common and 5,000 shares of class B common stock of said Allied Public Service Corporation, but denies all other allegations in paragraph 5(3).

5. (4 to 11) Denies the allegations in paragraphs 5(4 to 11).

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

W. FRANK GIBBS,
Special Attorney, Bureau of Internal Revenue.

Memorandum opinion

Filed April 22, 1933

[Title omitted.]

William P. Jeffery, Esq., for the petitioner.
Owen W. Swecker, Esq., for the respondent.

TRAMMELL: This is a proceeding for the redetermination of
13 a deficiency in income tax for 1928 in the amount of $9,156.69. The error assigned is that the Commissioner erroneously increased the item of profit on sale of securities from $2,970, reported by the petitioner in its return, to $50,228.84.

The petitioner is an individual residing at Deer Park, Greenwich, Connecticut. In August 1927, and for some years prior thereto, the petitioner was employed by the Associated Gas & Electric Company. His duties consisted in seeking out, examining into, and purchasing

public utility properties for that company. He was paid a commission based on the properties purchased. Shortly before August 1927 the petitioner secured options upon either the stocks or properties of four public utilities companies, giving him the right to purchase same as follows:

	Purchase price
Chester Water & Gas Company, located at Chester, Vermont	$36,000
Reading Light & Power Company, located at Reading, Vermont	9,500
Brownsville Electric Light Company, located at Brownsville, Vermont	4,500
Chittenden-Pittsford Distribution System, located at Pittsford, Vermont	45,000

According to the arrangement between petitioner and the Associated Company, the petitioner was required to first offer properties to the Associated Company, and if that company did not buy, petitioner was privileged to offer them elsewhere or to purchase them himself. Petitioner offered the above mentioned properties to the Associated Company. That company refused to purchase them. Thereupon petitioner purchased them himself, paying the amounts above stated. The petitioner purchased all the stock of the corporations except that of the Chittenden-Pittsford Distribution System. Instead of purchasing stock in the latter company, he purchased all of the assets. After purchasing the assets of the Chittenden-Pittsford Distribution System, the petitioner organized a corporation known as the Allied Vermont Corporation, and turned the assets over to that company for capital stock. On October 13, 1927, the petitioner organized the Allied Public Service Corporation, and exchanged the stock of the four above-mentioned companies for all the stock of the new corporation, consisting of 1,000 shares, no par value, preferred stock; 2,500 shares, no par value, common stock, class A; and 5,000 shares no par value, common stock, class B. The preferred stock was entitled to cumulative preferred dividends at the rate of $6 per share and was callable at $105 per share. The class A stock was callable at $35 per share.

In May 1928 the Allied Public Service Corporation sold the stocks of these four utility companies for $194,930.16. Thereafter, in the year 1928, the petitioner sold his preferred stock in the Allied Public Service Corporation to that corporation, receiving therefor $99,000. The petitioner in his income-tax return reported the sale of this preferred stock of the Allied Public Service Corporation and assigned $96,030 as the cost thereof and $99,000 as the sales price thereof, with resulting profit of $2,070.

When the petitioner transferred the stocks of the utility companies to the Allied Public Service Corporation receiving in exchange therefor all the stock of the latter company the transaction came under the reorganization provisions of the Revenue Act of 1926 and resulted in no tax at that time. This being true, the basis for determining gain or loss with respect to the sale of the stock of the Allied Public Service Corporation received by petitioner would be the same as the stock exchanged therefor. The petitioner, how-

ever, did not sell all the stock but only the preferred. The question is what is the basis for determining gain or loss of the preferred stock received by petitioner in the exchange.

In the case of Glenn S. Curtiss et al., 21 B.T.A. 629, we held that when securities of a single class are exchanged for new securities of different classes so that no gain or loss is realized, for the purpose of determining gain or loss on the subsequent sale of any of the new securities the proportion of the original cost or other basis to be allocated to each class of new security is that proportion which the market value of the particular class bears to the market value of all securities received on the date of the exchange. An allocation according to this principle is not questioned in this case.

The respondent fixed the cost of the Allied Public Service Corporation preferred stock sold by the petitioner at $48,771.16 by allocating that much of the total value of all stocks to the preferred stock. This cost was reached by a mathematical formula stated as follows:

$$\frac{\$99,000.00}{\$194,930.17} \times \$96,030 = \$48,771.16.$$

16 This cost, deducted from the admitted sale price, $99,000, produced a profit of $50,228.84.

The respondent determined the value of all the stock received in the exchange was $194,930.17. The petitioner claims that the value of all stock received in the exchange was $96,030, that is that all value should be attributed to the preferred stock. The question, however, is not what was the total value of all the securities received in exchange, but the value of the preferred stock, or rather what proportion of the total value of all securities is to be attributed to the preferred stock. It may well be that the properties acquired or all the classes of stocks received by the petitioner were worth only $96,030 as the petitioner contends and yet the preferred stock which petitioner sold may have had the value of $48,771.16 as determined by the respondent. It is obvious that even if all the securities were worth only $96,030 that the proportionate value of the preferred stock to all the stocks would not necessarily be different from that determined by the Commissioner.

The petitioner would question only one term in the proportion, that is, he contends that the amount of $96,030 should be substituted for $194,930.17 in the formula adopted by the respondent. However, this does not necessarily change the result. The very evidence which tends to show that $194,930.17 is not correct tends equally to show that $99,000 was not the value of the preferred stock when received in the exchange in 1927. If one of the two terms in the pro-

17 portion or formula is incorrect, the other must also be incorrect. If the preferred stock was not worth $99,000 at the time of the exchange and another numerator is to be substituted for that amount is the formula, as well as another amount in the denominator, the quotient may, for all the record discloses, be the same. At least there is no testimony to show that it is incorrect. Cf. Alexander Sprunt & Son, Inc. v. Commissioner, — Fed. (2d) —, decided April 4, 1933.

The testimony does not show that all of the value of all of the securities received in this exchange is to be attributable to the preferred stock. There were two other classes of stock. It may well be, for all the record discloses, that these other stocks had substantial value. There is no testimony as to the earnings or dividends or the reasonable prospects therefor or any other factor which would tend to show that the other classes of stock had no value. It is contended by the petitioner, however, that owing to the preferences attributable to the preferred stock that the common stock had no value unless the preferred stock was worth $100,000. The question, however, is one of fact to be determined by testimony and not theory. It is conceivable that common stocks may actually sell on the market when preferred stocks in the same corporation are selling at less than par. In any event, we do not think that the petitioner has shown that the amount allocated to the preferred stock sold by him is any different from that determined by the Commissioner by testimony which shows that the total value of all classes of stock is different from that used by the respondent in a formula for the purpose
18 of determining the value of the preferred stock. We accordingly approve the determination of the respondent.

Reviewed by the Board.

Judgment will be entered under rule 50.

Enter:

Entered April 22, 1933.

Decision

Entered June 9, 1933

[Title omitted.]

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered April 22, 1933, it is

Ordered and decided: That there is a deficiency in tax of $9,156.69 for 1928.

Enter:

Entered June 9, 1933.

Member.

[SEAL]

19 *Motion for new trial*

Filed August 30, 1933

[Title omitted.]

Comes now, Walter W. Taylor, the petitioner above named, by Truman Henson, his attorney, and moves this honorable Board that it grant a new trial in the above-entitled proceeding to receive evidence as to whether it be practicable to apportion the cost basis to your petitioner of his stock in the Allied Public Service Corporation

between his preferred and common stocks therein, and if the same appear to be practicable, as to what proportion of said cost basis should be allocated to said preferred stock.

The grounds upon which this motion is based are as follows:

First, that this proceeding was tried by both petitioner and respondent upon a theory which the Board, in its opinion, held to be erroneous, in consequence of which evidence sufficient to allow the Board to decide the cause upon its merits was not introduced, for the evidence presented was only that which was relevant to said
20 erroneous theory. And, second, that not only is that state of facts ample ground for granting a new trial, but also where, as here, the respondent's determination is clearly erroneous (as is hereinafter set out), the Board should not, for lack of proof by petitioner, redetermine the clearly erroneous deficiency determined by the respondent, but should receive further evidence to enable it to determine the just result upon the merits.

The only question presented in this proceeding is the cost basis to your petitioner of the preferred stock in the Allied Public Service Corporation received by him together with the common stock of said corporation on or about October 13, 1927. Petitioner, at that time, transferred to said corporation assets which he had acquired in August 1927, at a cost of $96,030.00, and in return therefor received all of the stock of said corporation, consisting of 1,000 shares no-par preferred (entitled to cumulative dividends at $6 per share per annum and to $100 per share upon liquidation), 2,500 shares no-par class A common, and 5,000 shares no-par class B common. In May 1928 said corporation sold its assets for $194,930.16, and thereafter, and during said year, said preferred stock was sold to said corporation by petitioner upon the payment to him of the sum of $99,000.00; and the question presented is the cost basis to petitioner of such preferred stock and the amount of income realized by him upon said sale. The cost basis of said preferred stock, as determined by the respondent, was that proportion of the cost basis of all the stock which said amount of $99,000.00, received by petitioner,
21 as aforesaid, upon the sale of his said preferred stock, bore to $194,930.16, the price received by said corporation upon the sale of its assets in May 1928. During the period from the receipt by the petitioner of the stock of said Allied Public Service Corporation on October 13, 1927, to May 1928, when the assets thereof were sold, a period of seven months, there was, as appears from the testimony of petitioner herein, a large appreciation in the values of public utility stocks.

Whereas it was and is conceded that the cost basis of all the stock must be apportioned between the respective classes on the basis of their respective market values, this case was tried by both petitioner and respondent upon the theory that if the total value of the assets acquired by said corporation did not at the time of such acquisition exceed the sum ($100,000) to which, by reason of its prefer-

ence, the preferred was entitled upon liquidation, then it followed, as a matter of law, that neither class of common had any value and that therefore the total cost to petitioner of the assets exchanged by him for such stock should be allocated in its entirety to the preferred.

As appears from the supporting affidavits of William P. Jeffery, former counsel for petitioner herein, and of Walter R. Bullock, petitioner's accountant, the foregoing theory was agreed to at the trial by counsel for the respondent; and the only questions asked of the witness at the trial by counsel for either party and the only matters treated in either brief, were as to the value of the
22 assets acquired by said corporation at the time the same were acquired, for under the agreed theory of the case that was the only material fact. As aforesaid, said theory was that although the cost of all the stock (or the cost of the assets which were exchanged for all the stock) must be apportioned between the respective classes of stock on the basis of their respective market values, nevertheless if it were shown that the value of the assets exchanged for the stock did not, at the date of the exchange, exceed the amount to which the preferred was entitled on dissolution, then it followed, as a matter of law, that the market value of each class of common was zero and, in consequence, that the cost of all the stock must be apportioned to the preferred. In view of this theory of the case, the only evidence adduced, and the only arguments advanced by either side were with respect to the value of said assets at the time the same were exchanged for the stock.

No contention is made that even a formal written stipulation to this effect would bind the Board. On the contrary, it is freely admitted that parties are not competent to stipulate questions of law. But it is most earnestly urged that where, due to trial on an erroneous theory, particularly when it is the theory adopted by both sides, evidence sufficient to decide a cause on its merits has not been introduced, a new trial should be granted to receive such further evidence as will permit a decision on the facts. "Trial on an erroneous theory would ordinarily be abundant reason for justifying the court in granting a new trial * * *" 46 C. J. 86.

Frink v. Commercial Bank, 195 Iowa, 1011, 1022; 191 N.W. 513, 519.

23 In Underwood v. Commissioner, 56 Fed. (2d) 67, where the case was tried on an erroneous theory and the petitioner having failed to prove his case on a proper theory, the deficiency determined by the respondent was redetermined by the Board, the decision of the Board was reversed and new trial ordered; and the Circuit Court of Appeals said, in part, p. 73:

"* * * there is the well-established rule that an appellate court has the power, without determining and disposing of a case, to remand it to the lower court for further proceedings if the case has been tried on a wrong theory, or the record is not in condition for

the appellate court to decide the question presented with justice to all parties concerned. See Finefrock v. Kenova Mine Car Co. (C.C.A.), 22 F. (2d) 627, 634, and cases cited: also Seufert Bros. Co. v. Lucas (C.C.A.), 44 F. (2d) 528.

"Reversed and remanded."

Dermott v. Wallach, 66 U.S. (1 Black) 96, 98.

"* * * there has been a mistrial below, for which the judgment must be reversed, and the case sent down, and a new venire ordered. There is a good bar to the action remaining untried, and not yet found for the plaintiff. * * *."

Iroquois Furnace Co. v. Wilkin Manufacturing Co., 181 Ill. 582, 600; 54 N.E. 987, 993.

"Where a case is tried upon an erroneous or mistaken theory of law, the judgment should be reversed, and the case sent back for a new trial."

24 Sensfelder v. Stokes, 69 N.J. Law 86, 89; 54 Atl. 517, 518.

"For it is well settled that a verdict cannot be supported upon a theory of law contrary to that upon which the case was submitted to the jury."

Painter v. Hudson Trust Company, 2 N.J. Misc. 1137, 1139; 126 Atl. 636, 637.

"* * * for it is entirely settled that, unless a verdict can be supported upon the theory of the law on which the case was submitted to the jury, it must be set aside."

Napoli v. Erie Railroad Co., 165 N.Y. Sup. 206, 208.

"* * * the issues having been disposed of at the trial upon the theory that the defendant by its deviation was a converter of the property entrusted to its care, which theory the trial court thereafter held to be inapplicable, and defendant being thus deprived of the right to go to the jury on the question whether the damage was caused by the failure of the defendant to follow the direction contained in the bill of lading, there must be a new trial."

Union Pacific Railway Co. v. Springsteen, 41 Kan. 724; 21 Pac. 774, where the court's headnote was, in part, as follows:

"A new trial should be granted when it appears that the only theory upon which a judgment could be sustained is upon a
25 phase of the action not tried, but practically ignored, and another phase thereof appeared to have been thoroughly tried, and regarded by all as the important and pivotal part of the case."

Having no evidence before it upon which it could decide the cause upon its merits, and having determined that the theory upon which the trial was had was erroneous, the Board herein redetermined the deficiency as determined by the respondent. On the evidence in the record, the only fact which the Board could find was the value on October 13, 1927, of the assets on that day transferred to the Allied Public Service Corporation, and this, it was held, was insufficient to form a basis for a decision on the merits; and, as aforesaid, the Board redetermined the respondent's determination for petitioner's failure to prove his case.

Whereas, it is freely admitted that a final determination of the Commissioner of Internal Revenue is, in the ordinary case, presumptively correct and entitled to redetermination by the Board in the absence of proof by the petitioner that it is erroneous and that another determination is correct, the rule is subject to the exception that if the Commissioner's determination is erroneous as a matter of law, it should not be redetermined by the Board, even though the petitioner fail to prove his case, but in such circumstances the Board should receive further evidence to enable it to determine the true and just result and make its redetermination upon the result of such inquiry.

26 In Underwood v. Commissioner, 56 Fed. (2d) 67, 72, the Circuit Court of Appeals for the 4th Circuit said, in part, in its opinion:

"It is settled that the taxpayer has the burden of proof by a number of decisions of the Supreme Court. * * * But we do not think that this rule so restricts the powers of the Board as to require it to countenance an obvious injustice. * * *

"The Board had ample power under the statute to require the production of additional evidence when it became clear that it could not do justice to the taxpayer by reason of the deficiencies in the record before it. It was unquestionably incumbent upon the taxpayer to offer the testimony in the first instance, and cases arise where the moving party must suffer the consequences of his own neglect. Here, however, * * * the Commissioner's action was wrong in a material respect. The information to correct the mistake was readily obtainable * * *. Under these circumstances, the Board should have deferred its decision until testimony showing the amount of the deductions to which the taxpayer was entitled was introduced, and then have redetermined the deficiency. The decision of the Board will therefore be reversed and the case remanded * * *. * * *. In a number of instances, Circuit Courts of Appeals have remanded case for rehearing when it seemed necessary in order to do justice to the parties. It does not appear in these cases that new evidence was available; but in the instant case the

27 evidence is known to exist and it would be an abuse of discretion to decline to receive it. * * *"

Again in Collin v. Commissioner, 32 Fed. (2d) 753, 754, where the question, as here, was the proportion of the cost of a block of preferred and common stock to be allocated to one of the classes of stock, and, the petitioner having failed to make his proof, the plainly erroneous determination of the Commissioner was redetermined, the Circuit Court of Appeals for the Sixth Circuit laid down the rule in these words:

"We are satisfied that some part of the total price paid for the stock units was paid for the common stock—what part we are unable to determine on the record here. Upon another hearing it may be practicable to obtain data or facts upon which a fair apportionment of cost as between the two classes of stock may be made, but, if it

should not be, then under article 39 of Regulation 45, the petitioner will not be chargeable with any profits until he shall have recovered the entire purchase price."

In Russell v. Commissioner, 45 Fed. (2d) 109, 103, the Circuit Court of Appeals for the First Circuit said, in part:

"While there is a presumption that the Commissioner's findings are correct, * * * when it appears, as in this record it does appear, that the methods pursued by the Commissioner were
28 mathematically and legally erroneous, that presumption no longer avails."

And in Cohan v. Commissioner, 39 Fed. (2d) 540, the Circuit Court of Appeals for the Second Circuit reversed and remanded a decision of the Board redetermining, for lack of proof by the petitioner, a deficiency determined by the Commissioner, but clearly erroneous.

In our case the petitioner did not, at the trial had herein, offer evidence as to the market values of the respective classes of stock received by him on October 13, 1927, when he acquired all of the stock of the Allied Public Service Corporation, and on that ground the Board redetermined the deficiency determined by the respondent in his notice of deficiency. The respondent's determination, however, was clearly erroneous and it is submitted that a new trial should be had to receive further evidence and determine whether it be practicable to allocate a part of the cost of all of the stock to the preferred, and, if so, what part should be so allocated.

That the respondent's apportionment, as contained in his said determination, is erroneous, is clear. He has applied against the cost of all the stock a fraction, the denominator of which is the amount received by the corporation as the price of its assets seven months after the petitioner's acquisition of the stock, and the numerator of which is the amount received by petitioner upon the sale of his preferred stock. It is petitioner's contention that however correct respondent's ratio of the values of the different classes of
29 stock may have been as of the date of the sale of the assets of the corporation in May 1928, it is erroneous on its face, as a matter of law, to assert that the same ratio was applicable as of a date 7 months earlier when the total value of the corporation's assets was about half what it was in May 1928. As a matter of law, the ratio of the values of preferred and common stock at one date is no evidence whatever of the ratio of the values thereof at a different date.

Kirkland v. Commissioner, 57 Fed. (2d) 608.

While it is true that the value of an asset on one date may be some evidence of its value on another date, it does not follow that the ratio between preferred and common stock on one date is evidence of the ratio at a different time. It is too much to assume that two different classes of stock, one preferred, and one common, appreciate or depreciate at the same rate. On the contrary, common

experience would lead to the opposite conclusion; and this is particularly true in a situation such as that presented in the instant case where the total value of the assets of the corporation is approximately equal to the retirement value of the preferred stock on one date, and approximately twice that amount on the other date. In view of the testimony in the record that the assets of the corporation were worth about $96,030.00 in October 1927 (the retirement value of the preferred being $100,000), that there was a rapid rise in the public utilities market between October 1927 and May 1928, and that said assets were sold in May 1928 for $194,930.16, it would appear that the ratio between the preferred and common as
30 of May 1928 must of necessity be different from that of October 1927. The Court of Appeals of the District of Columbia took judicial notice in the Kirkland case of the fact that common and preferred stocks appreciate at different rates and we submit that it is even plainer here that this common must have appreciated to a greater extent than the perferred. In point of fact, in these circumstances, the ratio of May 1928 is evidence only of what was not the ratio of October 1927. The May 1928 ratio is not evidence of the October 1927 ratio and to use it as such is error as a matter of law.

In the Kirkland case, supra, the question, as here, was the ratio between preferred and common stock. The two classes of stock were purchased in a block in 1923. In 1924 there were actual ascertainable market values for each class but the ratio of values could not be determined as of the time of the purchase by then existing evidence. As in our case, the Commissioner determined that ratio by means of the ratio of the later date, and petitioner not offering any proof as to the respective values of the classes of stock at the time of purchase, the Board redetermined the deficiency in accordance with the Commissioner's determination. On appeal to the Court of Appeals of the District of Columbia, however, this was reversed and the court said in part, at page 610:

"* * * it is not known whether this relation remained constant: that is to say, whether the advance in value of preferred and common was in the same ratio as the stocks bore to each
31 other at purchase: indeed, the probabilities are otherwise. Without this, it follows that it is impracticable, even under the method adopted by the Commissioner, to apportion the original cost * * *, and it was just to meet a condition such as this that article 39 of Regulations 65 was adopted."

It is submitted that not only under the authority of the Kirkland case, but also as is clearly apparent from the facts and circumstances herein, the respondent's determination is plainly erroneous as a matter of law; and that, because of such error, and upon the authority of the above cited decisions of four different Circuit Courts of Appeal and the Court of Appeals of the District of Columbia, the presumption of the correctness of respondent's determination is rebutted, or does not apply.

From the annexed affidavits in support of this motion, it appears that none of the stock of the Allied Public Service Corporation was listed or dealt in on any exchange at or about October 13, 1927, that there were no sales thereof at or about that date; and that the anticipated earnings of the corporation were not sufficient to pay any dividends on either class of the common stock. If a new trial is granted as herein prayed, petitioner will offer evidence indicative of whether it be practicable to apportion the cost basis of all the stock between the preferred and common, and if so, in what proportion.

Wherefore, your petitioner moves this honorable board that it grant a new trial herein to receive evidence as to whether it
32 be practicable to determine what part of the cost basis of all of said stock should be apportioned to the preferred, and if it appear to be practicable so to do, then to determine the part of such total cost so allocable to the preferred.

An oral hearing on this motion is requested.

Dated the 29th day of August, 1933.

(Signed) TRUMAN HENSON
TRUMAN HENSON,
Counsel for Petitioner,
Office and P.O. Address, 26 Liberty Street, New York City.

Affidavit of Walter R. Bullock

STATE of NEW YORK,
County of New York, ss.:

Walter R. Bullock, being duly sworn, deposes and says:

1. I am a certified public accountant, with office at 31 Nassau Street, city, county and State of New York, and I am familiar with the accounts and records of the Allied Public Service Corporation.

2. I have examined the data accumulated for Mr. Walter W. Taylor during the year 1927, upon the basis of which Mr. Taylor decided to purchase the stock or assets of Chittenden-Pittsford Distribution System, Chester Water & Light Company, Reading Light & Power Company, and Brownsville Light & Power Company, and from my examination of said data I am able to state,
33 upon information and belief, that said data discloses that the combined net income of said four companies for the year 1926, which was the last full year of operation of said companies prior to the formation of said Allied Public Service Corporation, was the sum of $9,536.54; and that said total combined net income in said sum of $9,536.54 was before any deduction for depreciation, Federal income taxes, or any costs for engineering management fees or holding company overhead expenses.

3. From my said examination of said data I am also able to state, upon information and belief, that the same contain appraisals of the reproduction value, after allowance for observed depreciation, of

the assets of said four companies, and that the same disclose a total value of depreciable assets as of the summer of 1927 in the sum of $84,620, which, at a composite depreciation rate of 5% would make an annual depreciation deduction of $4,231.00, thus reducing the aforesaid combined net income of said four companies to $5,305.54 before Federal income taxes and costs for engineering management fees and holding company overhead expenses.

(S.) WALTER R. BULLOCK.

[*Duly sworn to by Walter R. Bullock; jurat omitted in printing.*]

34 *Affidavit of Walter R. Bullock*

STATE OF NEW YORK,
County of New York, ss.:

Walter R. Bullock, being duly sworn, deposes and says:

1. I am a certified public accountant, with office at 31 Nassau Street, city, county, and State of New York, and I was associated with Mr. William P. Jeffery in the trial of Walter W. Taylor v. Commissioner, Docket No. 56876.

2. I was present at said trial and during the course of said trial Mr. Jeffery stated that he understood that the respondent agreed that if it be established that the market value of all of the assets of the Allied Public Service Corporation on October 13, 1927, when said assets were acquired by said corporation, was not in excess of $96,030.00, then the cost basis to Mr. Taylor of said preferred stock was $96,030, and that in that event all of the cost of all of the stock in the Allied Public Service Corporation should be allocated to the preferred; and Mr. Swecker indicated his assent to this statement either in words or by nodding his head, or by some other indication of assent. I do not find this assent to be expressed in the record herein, but the same was expressed at the trial as aforesaid.

(S.) WALTER R. BULLOCK.

[*Duly sworn to by Walter R. Bullock; jurat omitted in printing.*]

35 *Affidavit of William P. Jeffery*

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss.:

William P. Jeffery, being duly sworn, deposes and says, that he is the attorney for the petitioner in the trial of this proceeding before the Board of Tax Appeals.

Considerable discussion between trial counsel and the Board member is not set forth in the minutes of the proceedings. In the course of the discussion deponent, as counsel for petitioner, stated in effect

that as he understood the situation the sole issue was the value in October 1927 of certain properties acquired by Mr. Taylor in August 1927 and transferred by him to the Allied Corporation in October of that year; that if the value of these properties in October was the amount paid therefor by Mr. Taylor in August, then the assessment was improper and should be set aside, but that if the value of said properties was the sale price thereof in the following May, then the assessment was proper and should be sustained.

In the course of the discussion following the presentation of
36 this point, counsel for the Commissioner concurred in the proposition outlined above. At one point in the discussion the Board member inquired of counsel for the Commissioner if he concurred in the statement as to the issue and the effect of value determination as of October 1927. Counsel for the Commissioner stated that he concurred. While the record does not show all this discussion, the correctness of the foregoing statements is apparent from the record, and direct support for same is contained in the briefs submitted by counsel for the Commissioner.

WILLIAM P. JEFFERY.

[*Duly sworn to by William P. Jeffery; jurat omitted in printing.*]

Affidavit of Walter W. Taylor

STATE of MICHIGAN,
County of Berrien, ss.:

Walter W. Taylor, being duly sworn, deposes and says:

1. I am the petitioner above named, and I was president and
37 treasurer of the Allied Public Service Corporation from its formation in the year 1927 and throughout the year 1928.

2. There were no sales of any of the stock of said corporation at or about the time of the issuance of said stock to me nor at any other time; and none of said stock was listed, or dealt in, on any exchange at or about said time of the issuance of said stock to me, nor any time.

(S) WALTER W. TAYLOR.

[*Duly sworn to by Walter W. Taylor; jurat omitted in printing.*]

Substitution for counsel and notice of appearance

Filed August 30, 1933

[Title omitted.]

In accordance with rule 36, William P. Jeffery, of #1
38 Wall Street, city, county, and State of New York, hereby withdraws as counsel for the petitioner in the above-entitled proceeding; and Truman Henson, of #26 Liberty Street, city,

county, and State of New York, whose mailing address is #26 Liberty Street, New York City, hereby appears as counsel for said petitioner in the above-entitled proceeding.

WILLIAM P. JEFFERY.
TRUMAN HENSON.

Dated New York, N.Y., August 29, 1933.

———— ————,
Petitioner.

Petition for review

Filed September 8, 1933

[Title omitted.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Comes now, Walter W. Taylor, the petitioner in the above-
39 entitled proceeding, and petitions for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the United States Board of Tax Appeals entered herein on June 9, 1933, redetermining the deficiency, in the sum of $9,156.69, in your petitioner's Federal income tax for the calendar year 1928, theretofore determined by the respondent in his deficiency notice; and of the decision of the United States Board of Tax Appeals denying your petitioner's motion for a new trial; and respectfully shows, upon information and belief, as follows:

I

Your petitioner, Walter W. Taylor, is an inhabitant of the town of Greenwich, county of Fairfield and State of Connecticut, within the second circuit.

II

STATEMENT OF THE CONTROVERSY

The only question involved herein is whether it be practicable fairly to apportion between preferred and common, as of the date of acquisition, the total cost to your petitioner of certain preferred and common stock acquired by him for a lump sum; and if it be practicable so to apportion such cost, then what proportion thereof should be allocated to the preferred, all of which was sold by your petitioner in the year 1928.

On or before October 13, 1927, petitioner transferred, in
40 a nontaxable exchange, certain assets which had cost him $96,030.00 to the Allied Public Service Corporation and received in return therefor all of its capital stock, to wit, 1,000 shares no

par value preferred stock entitled to cumulative dividends at the rate of $6.00 per share per annum, and to $100.00 per share on liquidation; 2,500 shares, class A no par value common stock; and 5,000 shares, class B no par value common stock. During the period from October 1927 to May 1928 there was a rapid appreciation in the public utilities market. At or about the middle of May 1928 said Allied Public Service Corporation sold its assets for the sum of $194,930.16, and thereafter petitioner sold all of his preferred stock in said Allied Public Service Corporation to said corporation and received therefor the sum of $99,000.00. The question presented is, as aforesaid, the cost basis to your petitioner of said 1,000 shares of preferred stock.

The respondent, in his notice of deficiency, determined the cost basis of said preferred stock to be that proportion of the cost of all the stock which the sum received by petitioner upon the sale of said preferred stock, or $99,000.00, bore to the sum which said corporation received for its assets, or $194,930.16.

From such deficiency notice, petitioner took his appeal to the United States Board of Tax Appeals and thereafter a trial was had and briefs were filed by petitioner and respondent.

At said trial an agreement was entered into between counsel for petitioner and counsel for respondent to the effect that if it appeared

41 that the value of the assets acquired by the Allied Public Service Corporation from the petitioner in exchange for all of its stock was, at the time said assets were so acquired by said corporation, not in excess of the amount to which said preferred stock would have been entitled upon a liquidation, to wit, $100,000.00, then it followed that the preferred stock was the only stock of the Allied Public Service Corporation having any value; that the value of each class of common stock was zero; and that a fair apportionment of the cost of all of the stock would be to allocate all of said cost, or $96,030.00, to the preferred stock alone.

In consequence of said agreement, said trial was conducted upon such agreed theory; and petitioner introduced no evidence except such as was relevant to said theory, to wit, evidence relative to the value of the assets acquired by said Allied Public Service Corporation at the time the same were so acquired by it.

Thereafter, the Board of Tax Appeals rendered its opinion, holding that whether or not the value of the assets acquired by said Allied Public Service Corporation was, at the time the same were acquired, only $96,030.00, nevertheless it did not follow that the preferred was the only stock which had any value; and further holding that the petitioner, having introduced only such evidence as was relevant to said agreed theory, had not introduced evidence upon which the proceeding could be decided upon its merits; and further holding that the determination made by the respondent, from which petitioner had appealed to the Board, was entitled to a presumption of correctness and should be redetermined.

42 Thereafter, and on June 9, 1933, the Board entered its decision redetermining said determination made by the respondent in his notice of deficiency.

Thereafter, your petitioner moved said Board that it grant a new trial herein for the purpose of receiving evidence as to whether it be practicable fairly to apportion the cost basis of all of said stock, between the preferred and the common stock, and if it appear to be so practicable, as to what proportion of said cost should be so apportioned to the preferred. Annexed to said motion and in support thereof, petitioner filed affidavits setting out the fact of said agreement of counsel as to the aforesaid theory upon which the case was tried, and also further affidavits disclosing that there is in fact evidence upon which the Board of Tax Appeals could find whether said fair apportionment was practicable and if so what said apportionment should be. Said affidavits further set forth that such evidence is that there had been no sales of the stock of the Allied Public Service Corporation at or about the time the same was received by the petitioner; that said stock had never been listed or dealt in on any exchange, and that the anticipated profits of said Allied Service Corporation were not sufficient to pay any dividend upon any of said stock, except the preferred; and petitioner offered in said motion that if a new trial were granted he would produce evidence indicative of whether such fair apportionment were practicable, and if so, what the same should be.

In his said motion, petitioner urged that where a case has been tried by all parties upon an erroneous theory and the only
43 evidence submitted is such as is relevant to such erroneous theory alone, a party should not be penalized for failing to introduce other evidence at the trial, but that the Board should grant another trial or hearing and receive evidence upon which the case may be decided upon its merits. Petitioner further urged in said motion that in any event, and whether or not he should have been penalized for not introducing such further evidence at the trial, the respondent's said determination was so wrong as to be arbitrary, groundless, and fanciful; and that in view of such arbitrary, groundless, and fanciful nature of respondent's said determination, the same was not entitled to the presumption of correctness to which respondent's determinations are ordinarily entitled and should not have been so redetermined by the Board, but that the Board should inquire as to the facts to an extent sufficient to allow it to do justice to the parties. The ground upon which petitioner asserted respondent's said determination to be arbitrary, groundless, and fanciful was that for the purpose of determining the ratio between the preferred and common stocks as of the date of acquisition thereof by petitioner, respondent used, not a ration of the market values of the stocks as of that date, but a ratio as of a date seven months later, whereas, as a matter of law, in circumstances where, as here, there has been a very large appreciation amounting

to approximately 100% in the value of the assets of the corporation, and where, before such appreciation, the value of said assets was approximately equal to the liquidation value of the preferred stock,

a ratio between the classes of stock as of a date after the
44 appreciation has taken place, is no evidence of what the ratio between the classes of stock was before the appreciation, but, on the contrary, can be evidence only of what that ratio was not at the date before the appreciation took place.

After hearing said motion for new trial, the Board of Tax Appeals denied the same, and your petitioner brings this petition for review.

III

DESIGNATION OF COURT OF REVIEW

Your petitioner, being aggrieved by said decisions of the United States Board of Tax Appeals, and being an inhabitant of the town of Greenwich, county of Fairfield and State of Connecticut, which is within the Second Circuit, petitions for a review by the United States Circuit Court of Appeals for the Second Circuit of said decisions of the United States Board of Tax Appeals.

IV

ASSIGNMENT OF ERRORS

Your petitioner, as a basis for review, assigns the following errors committed by the United States Board of Tax Appeals herein:

(1) The Board erred in failing to find that the determination of the respondent from which petitioner appealed to the Board herein was erroneous as a matter of law.

(2) The Board erred in finding that the cost basis to your
45 petitioner of his preferred stock in said Allied Public Service Corporation was $48,771.16, for said finding was unsupported by any evidence, or by any presumption.

(3) The Board erred in making any decision of the case upon the evidence received.

(4) The Board erred in failing to require or admit further evidence.

(5) The Board erred in redetermining a deficiency in your petitioner's 1928 income tax in the sum of $9,156.69.

(6) The Board erred in failing to find that there was no deficiency in your petitioner's income tax for 1928.

(7) The Board erred in denying petitioner's motion for new trial.

Wherefore your petitioner prays that this honorable court may review said decisions of the United States Board of Tax Appeals and reverse and set the same aside, and that the clerk of the United States Board of Tax Appeals be directed to transmit and deliver to the clerk of this honorable court certified copies of all and every

documents and records necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of this honorable court and the statutes made and provided; and that this court review the decisions of the United States Board of Tax Appeals herein and direct the entry of a
46 decision by said Board that there is no deficiency in petitioner's said income taxes for the calendar year 1928; and your petitioner further prays for such other and further relief as may seem to this honorable court to be just and in the premises warranted.

(Signed) TRUMAN HENSON.
TRUMAN HENSON,
Attorney for Petitioner,
Office and P.O. Address, 26 Liberty Street, New York City.

Duly sworn to by Walter W. Taylor; jurat omitted in printing.

47 *Notice of filing petition for review*

(Filed Sept. 8, 1933.)

[Title omitted.]

To E. BARRETT PRETTYMAN, Esq.,
General Counsel,
Bureau of Internal Revenue, Washington, D.C.,
Attorney for the Respondent.

SIR: Please take notice that on the 8th day of September 1933 the undersigned presented to this Board and filed with the clerk thereof the petition of Walter W. Taylor, a copy of which is annexed hereto, for the review, by the United States Circuit Court of Appeals for the Second Circuit, of the decisions of the Board in the above-entitled proceeding.

Dated Washington, D.C., September 8, 1933.

(Signed) TRUMAN HENSON,
Attorney for the Petitioner,
26 Liberty Street, New York City.

48 Service of the within notice and copy of petition for review is admitted this 8th day of September 1933.

(Signed) E. BARRETT PRETTYMAN.

Statement of the evidence

(Filed Sept. 29, 1933.)

[Title omitted.]

The above-entitled cause came on for hearing before the Honorable Charles M. Trammell, member of the United States Board of Tax Appeals, in Washington, D.C., on the 14th day of November 1932,

there being present the petitioner by his then counsel, William P. Jeffery, and the respondent by his counsel, Owen W. Swecker (C. M. Charest, then general counsel, Bureau of Internal Revenue).

The petitioner, to maintain the issues on his behalf, intro-
49 duced the oral testimony of Walter W. Taylor and various documents marked Petitioner's Exhibits 1, 2, 3, and 10, respectively, which were duly admitted in evidence. The Board of Tax Appeals made no separate findings of fact herein, but found that the cost basis to petitioner of his preferred stock in the Allied Public Service Corporation was $48,771.16, which was the cost basis thereof determined by respondent in his notice of deficiency. In the petition for review of the Board's decision, error has been assigned that said finding was unsupported by any evidence; that the respondent's said determination was plainly wrong and not entitled to the presumption of correctness accorded it by the Board; that the Board should have made no decision of the case upon the evidence received, but should have granted petitioner's motion for new trial and received the further evidence offered by petitioner.

Walter W. Taylor, having been called as a witness on behalf of petitioner and having been duly sworn, testified upon direct examination in substance as follows:

Petitioner was, in 1928, in the business of public utility broker, employed by the Associated Gas & Electric Company, and his duties were buying electrical public utility properties of the same type as those involved in this proceeding. It was a part of his duties to investigate properties, ascertain whether they could be purchased and, if so, whether they could be purchased on terms satisfactory to said Associated Gas & Electric Company; and to carry through the purchases if said company so desired. He had been en-
50 gaged in such business for some years and was compensated therefor by a salary and commissions.

In the year 1927, petitioner, in the course of his said employment, investigated four disconnected properties, consisting of four electrical distribution systems located in different parts of the State of Vermont; and entered into negotiations for the purchase thereof. Said properties were by name: Chester Water & Light Company, Reading Light & Power Company, Brownsville Electric Company and Chittenden-Pittsford Distribution System. Petitioner offered said properties to said Associated Gas & Electric Company, but said company declined to purchase the same and petitioner thereupon, and as he was entitled under the terms of his employment to do, purchased the same himself in August 1927 at a total cost of $96,030. Petitioner had had no prior connection with any of said properties and the transaction was one where the vendors sought to get as much as they could and petitioner sought to get the properties as reasonably as possible. Petitioner supplemented his own judgment of the values of said properties by employing a firm of electrical engineers, whom he considered qualified, to make an in-

vestigation; and said engineers made such investigation and rendered a report on such values to petitioner.

In purchasing said properties, petitioner purchased all of the stock of the respective corporations owning three of the same and purchased the assets of the fourth; and petitioner thereupon caused a corporation to be formed to which he transferred the assets of said fourth property, receiving all of the stock of said corporation in return. Upon the acquisition of said stocks and
51 assets, petitioner also caused another corporation known as the Allied Public Service Corporation, to be formed to take over all of said properties, and the certificate of incorporation thereof was filed on September 1, 1927. Shortly thereafter, and on October 13, 1927, petitioner transferred to said Allied Public Service Corpofation all of the capital stock of said three corporations which he had purchased and also the stock of the corporation he had formed to take over the assets of the fourth of said properties, and petitioner received in return therefor all of the stock of said Allied Public Service Corporation. The capital stock of said Allied Public Service Corporation consisted of 1,000 shares of no-par value preferred entitled to cumulative dividends of $6 per share per annum and to $100 per share on liquidation before any distribution to any other stock, and callable at $105 per share; 2,500 shares class A, common, entitled to $35 per share on liquidation before any distribution to the class B stock; and 5,000 shares class B, common, which was entitled on liquidation to any balance after the payment of $100 per share to the preferred and $35 per share to the class A stock. A certificate of stock of said Allied Public Service Corporation, setting out the rights of such classes of stock in substance, as aforesaid, was offered and received in evidence and marked Petitioner's Exhibit No. 1.

The witness, continuing under direct examination, further testified in substance as follows:

After said transfer, petitioner owned all of the stock of said Allied Public Service Corporation, and said Allied Public Service Corporation owned all of the stock of said four public utility
52 companies; and said Allied Public Service Corporation thereafter operated said four companies.

Thereafter, and in the late winter of 1927, or the early spring of 1928, petitioner started negotiations on behalf of said Allied Public Service Corporation for the sale of the stocks of said four public utility companies, and in the course of said negotiations, came into contact with the Colonial Utilities Corporation. Petitioner finally entered into an agreement with said Colonial Utilities Corporation on behalf of said Allied Public Service Corporation, and said Allied Public Service Corporation sold the stocks of said four utility companies to said Colonial Utilities Corporation for $194,930.16 in cash.

Thereafter, and during the year 1928, petitioner sold to said Allied Public Service Corporation said 1,000 shares of said preferred stock

of said Allied Public Service Corporation for $99,000 cash; and on his income-tax return for said year 1928, petitioner reported said sale price of $99,000, and a cost of said 1,000 shares of preferred stock of $96,030, and a profit on the transaction of $2,070.

Under date of November 13, 1930, petitioner received a letter from the Treasury Department, which letter was offered and received in evidence, and marked Petitioner's Exhibit No. 2, to show how the respondent arrived at his computation of profit. In said letter one-third of said $96,030 was assigned to said preferred stock as the cost basis thereof, one-third of said $96,030 was assigned to said class A common stock, and one-third to said class B common stock.

53 Under date of February 5, 1931, petitioner received a further letter from the Treasury Department which assigned a different cost basis to said 1,000 shares preferred stock of said Allied Public Service Corporation. Said Treasury Department letter dated February 5, 1931, was offered and received in evidence, and marked Petitioner's Exhibit No. 3, for the purpose of showing the basis of respondent's determination as set out in his notice of deficiency herein and respondent's computation of petitioner's profit on said sale of said 1,000 shares of preferred stock. Said letter disclosed respondent's said determination to be that the cost basis to petitioner of said 1,000 shares of preferred stock was $48,771.16 and that petitioner's profit on said transaction was $50,228.84. Said cost basis of $48,771.16 for said preferred stock was computed by respondent by applying against $96,030 the cost basis of all of petitioner's stock in said Allied Public Service Corporation a fraction, the denominator of which was $194,930.16, the sum for which said Allied Public Service Corporation sold the stocks of said four public utility companies in May 1928 and the numerator of which was $99,000, the sum received by petitioner upon the sale of said 1,000 shares of Allied Public Service Corporation stock thereafter.

The witness, continuing under said direct examination, further testified in substance as follows:

Prior to either conducting or closing negotiations with the Colonial Utilities Corporation, petitioner interviewed other companies to see whether or not they would be interested in purchasing said public utility properties but did not come to any agreement with

54 them. Among others, petitioner interviewed the New England Public Service Corporation and in the course of his negotiations, petitioner received a letter from said New England Public Service Corporation. The properties for the sale of which petitioner was negotiating were the same properties which petitioner had acquired and transferred to the Allied Public Service Corporation.

The Colonial Utilities Corporation approached petitioner and asked if he knew of some small properties located in New England which they could acquire for approximately $200,000. It seemed that they needed about that much property to enable them to finance properties which they already had and make a public bond issue.

They wanted the properties to be in New England because the balance of their properties were located in that vicinity and because the name of their company was the Colonial Utilities Corporation. Petitioner told them that he had four such properties himself which he would sell them for approximately that figure. They seemed to be interested and sent their engineers to make an investigation and came back to petitioner and entered into negotiations, at the end of which the transaction was closed. During the period from the purchase of said four public utility companies by petitioner until the Allied Public Service Corporation sold the same, there had been certain additions put into the properties, some current assets, some quick assets, some working capital, and some profit accrued, so that there were, when the Allied Public Service Corporation sold said properties, additional assets in the total amount of about $10,000.

55 At the time petitioner purchased said properties, he personally investigated the same and examined into their earning statements and records.

The Colonial Utilities Corporation was a new company which had been organized, under which there had been gathered together a group of previously independent companies. The securities of the companies so acquired by the Colonial Utilities Corporation were not on the public market and the Colonial Utilities Corporation bought its said subsidiaries for the purpose of putting out securities to sell through banks, and explained to petitioner that they needed to get about $200,000 more in their balance sheet in order to build their company to a size to make it marketable from a banking standpoint. Before that conversation, petitioner had not made the Colonial Utilities Corporation an offer, at which the Allied Public Service Corporation would sell, but that conversation suggested to petitioner the price to ask from the Colonial Utilities Corporation. Petitioner had previously sought to secure offers from other companies and had been unable to secure any offers from other companies for such figures or anywhere near such figures, nor had he been able to secure any definite offers, although he had tried to do so.

Between August and October 1927, or the date when petitioner acquired said four public utility properties and the date when the same were transferred to the Allied Public Service Corporation, nothing of consequence occurred in the utility market, but thereafter, and beginning in January 1928, and continuing to some time beyond May 1928, there was a considerable difference in the utility field, the acquisition or desire to acquire subsidiaries by larger utility groups and a boom in the utility field.

56 The Colonial Utilities Corporation was not an Insull subsidiary but the New England Public Service Company was.

A map of the State of Vermont with red circles thereon was shown to the witness and the witness identified said red circles as representing the locations of said four public utility properties at Pittsford, Vt., Chester, Vt., Brownsville, Vt., and Reading, Vt. Such

map was offered and received in evidence, and marked "Petitioner's Exhibit No. 10."

Continuing under direct examination, the witness further testified as follows:

Reading and Brownsville, for which properties petitioner paid $9,500 and $4,500, were fairly close together. Chester was approximately twenty miles from Reading or Brownsville. Chester was from forty to fifty miles from Pittsford. Pittsford was thirty to forty, or forty-five to fifty, miles from Reading. Except for Brownsville and Reading, said properties were not contiguous and did not serve adjoining or touching territory. There were other companies in between, serving the districts between the two larger of said companies, both as between themselves and as between them and the small companies.

Beginning in the early part of 1928, there was great activity among the large holding companies for the acquisition of smaller properties. This became more pronounced in the early part of 1928 than prior thereto. Petitioner was familiar with what was going on in the utilities field, both from the standpoint of market prices publicly and the action of the various companies in assembling group
57 properties. The public was demanding public utility securities; they were paying higher and higher prices, and it was much easier for the holding companies to finance the purchase of properties by reason of the fact that they could dispose of their securities to the public at a very high price, which enabled them to do financing at a very low rate and they could afford to pay high prices. Due to the popularity of such properties, and the fact of a lower yield than theretofore being acceptable to the public, the utilities companies, in assembling properties for the purpose of public offerings, could pay more and did pay more. It was a demand which became very pronounced in the early part of 1928 which permited that form of operation and financing.

The direct examination of the witness concluded at this point.

Upon cross-examination, petitioner testified in substance as follows:

In August 1927 he purchased the entire capital stock of the Chester Water and Light Company and the Reading Light & Power Company and the Brownsville Electric Company, and the assets of the Chittenden-Pittsford Distribution System. The assets of Chittenden-Pittsford Distribution System were subsequently incorporated and known as the Allied Vermont Company and the entire capital stock thereof was transferred to petitioner. Petitioner then turned over to the Allied Public Service Corporation the stocks of said four corporations and in return received 1,000 shares no-par value preferred stock; 2,500 shares no par value common class A; and 5,000 shares no par value common class B. The class A
58 stock had no voting rights, the class B common had voting rights, and the preferred stock had no voting rights except in case of default.

After petitioner acquired said four public utility companies in August 1927, he operated the same from his office in New York until they were transferred to the Allied Public Service Corporation. The same people carried on the operation in the territories under petitioner's supervision and the supervision of petitioner's engineers. Subsequent to the time that the Allied Public Service Corporation took said four properties over, they were still operated from petitioner's office in New York, but the actual technical operation was handled from the office of Ives and Davidson, petitioner's said engineers, and the financial operations were handled from petitioner's office in New York. The operations went on just the same. The engineers began their operations simultaneously with petitioner's acquisition of the properties.

Petitioner assumed that the reason the Associated Gas & Electric Company did not want to buy the properties when he offered them to it was that said Associated Gas & Electric Company was not interested in those properties.

Petitioner was not sure of the exact amount by which the assets of said four public utility companies were increased during the period they were operated by him and the Allied Public Service Corporation, but he thought the amount was between five and ten thousand dollars. Said additions consisted of working capital, stock of supplies, one or two small extensions, additions to property, additional meters, additional extensions and lines.

59 The Colonial Utilities Corporation paid the Allied Public Service Corporation for the stocks of said four companies, when they were purchased in 1928, $191,000 and some odd. At that time, the engineers of the Colonial Utilities Corporation made an examination of the properties.

The great increase in the activities of public service stocks began in the late fall of 1927 and continued straight through to May, or into May. Petitioner did not go farther than May in his investigation but there was a great appreciation in values between the late fall of 1927 and May of 1928. Petitioner had been engaged in buying properties for the Associated Gas & Electric Company since 1924 and during the years prior to 1928 and from 1924, petitioner had acquired approximately 30 to 40 properties.

The reason petitioner was able to sell these properties was that the Colonial Utilities Corporation needed an exact amount of assets which was approximately the same amount of assets represented by these particular properties. If petitioner had not had assets equal to the amount which the Colonial Utilities Corporation needed for their particular purpose, probably he would not have sold the whole four as easily as he did. Ordinarily, it would be easier to sell a consolidated group of four properties than to dispose of one single company, but a purchaser might not necessarily be interested in all the properties which one might hold, and in some cases it might be much easier to sell one property than four, depending upon whether the property in which the prospective purchaser was in-

terested was contiguous to such prospective purchaser's own
60 property. It is absolutely not true that in this case, where petitioner had four properties within a radius of 40 or 50 miles that those four properties would control the light and power business of that immediate locality, because a very large holding company, the Insull property, was in and around that vicinity. Said four public utility companies were little distribution systems which purchased their electricity from the large trunk lines, the holding company of which Insull was the head, and most of the bulk of the business was in between and could not be reached at all. Petitioner would have thought that for purposes of purchase by the Insull interests, these four properties would have been more valuable, but the letter received from the New England Public Service Company advised him to the contrary. The New England Public Service Company was the company which theoretically should have operated the property at lower costs than anyone else.

Petitioner attended to drawing up the charter of the Allied Public Service Corporation, and he had the power to state as to whether the preferred stock was callable or whether the class A was callable at a certain figure or whether the class B would be callable at a certain figure.

In petitioner's opinion, consolidation of said four companies did not enhance the value of the stock. The enhancement of the value was due to circumstances, if a buyer wanted properties located in a particular territory, plus the general appreciation of all utility properties during that period; and that was the real reason why
61 petitioner was able to sell these properties at a profit for the Allied Public Service Corporation. Petitioner thought it would have been very hard to dispose of only one of these properties; it depended upon the purchaser. Had the Insull organization, which surrounded the properties at that time, been a willing purchaser, it would have been just exactly as easy to sell one as four, but, to the average purchaser, it probably was easier to sell four in a group; it was in this particular case under petitioner's circumstances. In petitioner's opinion, the value of $194,000 that was received for these properties was based entirely upon the consolidation of them and the further fact that the Colonial Utilities Corporation wanted properties of about that amount.

The cross-examination of the witness concluded at this point.

On redirect examination the witness testified, in substance, as follows:

In his previous experience, petitioner had bought many single companies. There was no connection whatsoever between the said four public utility companies. From the standpoint of operation, they produced no more income when owned by one than as four separate companies. The Insull interests might have been just as interested, or more so, in buying one property than four. Petitioner could not say whether any other person would be more interested in buying the four properties than in buying one. Petitioner, as an

experienced man operating in this field, was unable to state whether four separate unconnected and unrelated companies, from the
62 standpoint of location, are, in the aggregate, more valuable than the sum of four units separately owned. Under certain circumstances, a man or company interested in getting as many companies as he can buy at a given price, would be interested in taking four, and another man or company who might be interested in acquiring a lesser number or amount, would be interested in one. It turns on the particular situation and the desires of particular purchasers.

Petitioner was shown a memorandum which refreshed his recollection, and continuing under redirect examination he testified in substance as follows:

The amount which was included in the four companies when their stocks were sold by the Allied Public Service Corporation but which was not included when said four companies were purchased by petitioner was $10,669.78. Otherwise the properties were the same.

The redirect examination of the witness concluded at this point.

On recross examination petitioner testified, in substance, as follows:

There were no distributions or dividends declared by said four public utility corporations during the period from August to May 1928.

The recross examination of the witness concluded at this point.

On redirect examination petitioner testified, in substance, as follows:

During the time of petitioner's ownership, said four public
63 utility corporations were earning on a basis of between nine and ten thousand dollars a year. No evidence was adduced as to whether said earnings were gross or net, or whether the same were sufficient to make any earnings available for the declaration of dividends by said Allied Public Service Corporation.

Counsel for both petitioner and respondent thereupon stated that they had no further questions and the witness was excused.

Petitioner called no further witnesses and respondent called no witnesses.

The foregoing is the substance of all the evidence adduced at the trial in said proceeding.

(Signed) TRUMAN HENSON.
TRUMAN HENSON,
Attorney for Petitioner,
Office and P. O. Address, #26 Liberty Street, New York City.

Agreed to:
E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

The foregoing contains the substance of all the evidence given on the hearing of this proceeding and in order that the same may be preserved and made of record, this statement of evidence is duly

stated, approved, signed and ordered to be made of record in the above-entitled cause, this 29th day of September, 1933.

By the Board:

(Signed) CHARLES M. TRAMMELL,
Member.

64 *Praecipe*

Filed October 26, 1933

[Title omitted:]

To the clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the filing of the Petition for Review, transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents and records in the above-entitled case:

1. The docket entries of proceedings before the United States Board of Tax Appeals.
2. Pleadings before the Board.
(a) Petition, including annexed copy of notice of deficiency.
(b) Answer.
3. Memorandum opinion of the Board.
4. The decision of the Board entered June 6, 1933.
5. Substitution of counsel and notice of appearance, filed August 30, 1933.

65 6. Motion for new trial, including supporting affidavits as follows: Affidavit of Walter W. Taylor, sworn to September 2, 1933; affidavit of William P. Jeffery, sworn to August 29, 1933; and two affidavits of Walter R. Bullock, sworn to August 28, 1933.

7. Order of the Board denying motion for new trial.
8. Petition for review.
9. Notice of filing petition for review.
10. Statement of evidence.
11. This praecipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated New York City, October 23, 1933.

(Signed) TRUMAN HENSON,
TRUMAN HENSON,
Counsel for Petitioner,
Office and P.O Address, 26 Liberty Street, New York City.

Service of a copy of the within praecipe is hereby admitted this 26th day of October, 1933.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

66 [Clerk's certificate to foregoing transcript omitted in printing.]

67 In United States Circuit Court of Appeals for the Second Circuit

Opinion

Entered May 7, 1934

No. 283. October term, 1933

Argued April 2, 1934. Decided May 7, 1934

WALTER W. TAYLOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the Board of Tax Appeals

Before MANTON, L. HAND, and CHASE, Circuit Judges.

Appeal by a taxpayer from an order of the Board of Tax Appeals fixing a deficiency in his income taxes for 1928.

Trumen Henson, of New York City, for appellant.

Walter L. Barlow, of Washington, D.C., for appellee.

L. HAND, *Circuit Judge:*

This appeal (petition to review) is from an order of the Board of Tax Appeals fixing a deficiency in the taxpayer's income tax for 1928, under the following circumstances: In October 1927 he bought the shares of three small lighting companies in Vermont, and all the assets of a fourth. For all four he paid $96,000, and he at once organized a separate company, to which in consideration of all its shares, he conveyed the assets of the fourth company. Thus armed with the shares of four operating utility companies, he organized a holding company which, in exchange for his shares, issued to him its entire share capital; that is to say: 1,000 shares of preferred stock, without par value, but entitled to $100 on any distribution, callable at 105, and bearing a cumulative dividend of 6%; 2,500 shares of non-par class A stock, redeemable at thirty-five dollars; 5,000 shares of non-par class B stock. In May 1928 another holding company which was on the look-out for job lots of utility shares with which to fill out some projected issues, bought from the taxpayer's holding company all the shares of the four operating companies for $195,000. He thereupon retired the full issue of preferred shares for $99,000, leaving $96,000 in the company's treasury, and having all the class A and class B shares and $99,000 in his own hands. The question is what is the right "basis" of the preferred shares for calculating taxable gain. The Commissioner found this by dividing the original aggregate cost of the properties, $96,000, in the same proportion that the amount at which the preferred shares were redeemed, $99,000, bore to the price paid for all the

assets of the holding company, $195,000. This resulted roughly in allocating $49,000 as "basis" and $47,000 as gain. This the Board affirmed and the case comes here on the taxpayer's appeal.

The Revenue Act of 1928, like its predecessors, gave no clue to the proper treatment of such a problem. The general sections (secs. 111–113 [26 U.S.C.A. §§ 2111–2113]) did not even suggest a solution, and from 1918 forward the Commissioner promulgated a series of regulations to cover it, which have been substantially the same. Article 39, Regulations 45, Revenue Act 1918; article 39, Regulations 62, Revenue Act 1921; article 39, Regulations 68, Revenue Act 1924; article 39, Regulations 69, Revenue Act 1926; article 58, Regulations 74, Revenue Act 1928. That issued under the Revenue Act of 1928 appears in the margin.[1] The meaning of the word "bonus" as there used is obscure. Obviously it does not mean that the actual value of the bonds or preferred shares must exhaust the whole purchase price; if it did there could never be any apportionment. Possibly it is the par of the prior securities, but it is not clear whether the rate of interest or dividends should not come into the computation. For example, suppose that preferred shares with a par of $100 carry a non-cumulative dividend of only four per cent. However well secured they might be they would not sell at par in most markets. Should such shares be estimated at par in determining whether the common shares are a "bonus", or should they be taken at their value, if issued by a company of the most impeccable solvency? These questions we leave unanswered because both sides assume that the common shares at par were a "bonus", as almost certainly they were, whether their par be taken, or the value of a perfectly secure issue of like kind. There was little possibility that in 1927 a preferred share, carrying cumulative 6% dividends, and callable at $105, in an absolutely sound company, would not have been worth $96.

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The preferred shares of the taxpayer's holding company were by no means in that class, and we agree with the Board in thinking that the common shares probably had a value. What that value was we have no means of knowing; the question is whether the taxpayer has shown that at least it was less than the Commissioner's allocation. In deciding the contrary the Board invoked the burden of proof, a rubric which has saved the Treasury many a doubtful case, but which can easily be pushed to deny taxpayers privileges plainly theirs. Here it seems to us a complete non-sequitur to suppose that because in May 1928 the preferred shares were worth about one-half of a total of $195,000 they were worth only that proportion of $96,000 in October of 1927. The preferred shares were a first call

[1] ART. 58. Sale of stock and rights.—* * * Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost.

upon any income up to $6,000; they could not be redeemed for less than $105,000, nor could the common shares get anything in distribution until $100,000 had been paid on them. That such an issue was worth only $49,000 out of $96,000, leaving $47,000 for the common shares, is to our minds too unreasonable to require positive disproof. And when it is attempted to justify such a conclusion affirmatively by the fact that eight months later that was the proportion between the two issues in an aggregate value of nearly twice as much, its arbitrary nature becomes even more apparent. Kirkland v. Burnet, 61 App. D. C. 88, 57 F.(2d) 608.

Nevertheless, while we think that the finding of the Commissioner was wrong, it does not follow that any allocation of the original consideration was "impracticable." True, the shares had just been issued and had therefore never paid a dividend; but the subsidiaries may have had a substantial history and their incomes been reasonably predictable; indeed the evidence was that while the taxpayer owned them, they had a joint income at the yearly rate of $9,000 or $10,000, though whether this was gross or net did not appear. At any rate we cannot say that it was impossible to ascertain the income of the holding company, or with that as datum to estimate the values of the preferred and common shares in October 1927. The taxpayer made no effort to prove that apportionment was "impracticable", excusing himself by exceedingly vague and unsatisfactory affidavits of the existence of an oral stipulation which the Commissioner does not admit to have been made, and which we may not consider. If the burden of proof goes so far as to demand not only that the taxpayer show that the deficiency assessed against him is wrong, but what is the proper deficiency, or that there should be none at all, the decision was right, even though we know that the tax is too high. In an action to recover taxes unlawfully collected the burden does go so far. United States v. Anderson, 269 U.S. 422, 443, 46 S.Ct. 131, 70 L.Ed. 347; Reinecke v. Spalding, 280 U.S. 227, 233, 50 S.Ct. 96, 74 L.Ed. 385. But the reason for this is obvious; a plaintiff, seeking an affirmative judgment measured in dollars, must prove how much is due. His claim is for money paid and he must show that every
69 dollar he recovers is unjustly withheld. So it is not enough merely to prove that the tax as a whole was unlawful; some of the dollars he paid may nevertheless have been due. But this reasoning does not apply when the proceeding is to review an assessment. Although that does indeed partake of the nature of a judgment, and the taxpayer has the burden of proving that it was wrong, after he has done so, he need not, at least under ordinary principles of procedure, prove that he owed no tax, or what was the tax that he did owe. The original assessment rested upon a finding, presumptively correct, but the presumption of its correctness does not extend to other findings which the Commissioner has never made. Any other result would invert the ordinary rules of procedure by imposing a burden of establishing a negative upon

the obligor; indeed of disproving the existence of all possible obligations. It must be owned, however, that the cases are not all in accord, though we do not think that Burnet v. Houston, 283 U.S. 223, 227, 51 S.Ct. 413, 75 L.Ed. 991, should be counted among those which impose such a burden; the facts were quite otherwise. Usually it has been a deduction, not an item of gross income, that has been in question. Saxman C. & C. Co. v. Com'r, 43 F.(2d) 556 (C.C.A. 3); Atlantic Bank & Trust Co. v. Com'r, 59 F.(2d) 363 (C.C.A. 4); Lightsey v. Com'r, 63 F.(2d) 254 (C.C.A. 4). And conceivably as to deductions the rule should be the same as in an accounting where the debtor has the burden of proving all credits. If that be the explanation, this is not such a case, because there is no taxable "gain" until both the receipt and the "basis" are found. But if it be not the explanation, at least the law is not settled, because several Circuit Courts of Appeal have refused to push the burden so far. Having once decided that the finding of the Commissioner was positively wrong they have sent the cause back for a new hearing, although the taxpayer had not proved enough to allow them finally to dispose of the case. Collin v. Com'r, 32 F.(2d) 753, 754 (C.C.A. 6); Rhode Island Hospital Trust Co. v. Com'r, 29 F.(2d) 339 (C.C.A. 1); Strother v. Com'r, 55 F.(2d) 626, 632, 633 (C.C.A. 4); Underwood v. Com'r, 56 F.(2d) 67, 72, 73 (C.C.A. 4); Eau Claire, etc., Co. v. Com'r, 65 F.(2d) 125 (C.C.A. 7); Ferguson v. Com'r, 59 F.(2d) 893 (C.C.A. 10). The statute itself (Revenue Act 1926, § 1003) provides for a rehearing if "justice may require" (section 1226 (b), title 26, U.S. Code, 26 U.S.C.A. § 1226 (b)). It is impossible to suppose that "justice" requires one only in case the Commissioner has failed to make out his case.

Order reversed; cause remanded for further proceedings in conformity with the foregoing.

Chase, Circuit Judge, dissents without opinion.

70 United States Circuit Court of Appeals, Second Circuit

Judgment

Entered May 18, 1934

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 14th day of May, one thousand nine hundred and thirty-four.

Present: Hon. MARTIN T. MANTON, Hon. LEARNED HAND, Hon. HARRIE B. CHASE, Circuit Judges.

WALTER W. TAYLOR, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed and cause remanded for further proceedings in conformity with the opinion of this court.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

(Endorsed:) United States Circuit Court of Appeals, second circuit. Walter W. Taylor vs. Commissioner of Internal Revenue. Order for mandate. United States Circuit Court of Appeals. Filed May 18, 1934. William Parkin, clerk, second circuit.

71 [Clerk's certificate to foregoing transcript omitted in printing.]

C Supreme Court of the United States

Order allowing certiorari

Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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